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Supreme Court, U.S.
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No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 2000

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BRADFORD METCALF,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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BRADFORD METCALF, *Pro se*
POST OFFICE BOX 33
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32 pp

## QUESTIONS PRESENTED

The following questions are presented by the Petitioner:

1. Is the Second Amendment of the U.S. Constitution an individual right?

2. What constitutes a machinegun?

## PARTIES BELOW

Petitioner Bradford Metcalf was the defendant-appellant in the court below. Respondent United States of America was the plaintiff-appellee in the court below.

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UNITED STATES OF AMERICA,
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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

---

## PETITION FOR A WRIT OF CERTIORARI

---

Bradford Metcalf, on behalf of himself, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, filed on June 28, 2000. The petition for rehearing and rehearing en banc was denied by the same three-judge panel on August 15, 2000. The Constitutional rights of petitioner were violated in the district court and in the Sixth Circuit Court of Appeals.

## OPINIONS BELOW

The Court of Appeals' denial of petition for rehearing and petition for rehearing en banc is reproduced at la-2a of the Appendix to this certiorari petition (hereafter "Pet. App."). The Court of Appeals' Order is reproduced at Pet. App. 3a-12a.

## JURISDICTIONAL STATEMENT

The Court of Appeals' final judgment was entered on August 15, 2000. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This case involves the Second Amendment, United States Constitution, 10 U.S.C. § 311(a), and 18 U.S.C. § 922(o)(1).

The Second Amendment, United States Constitution provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

10 U.S.C. Section 311 (a) provides:

> **Militia: composition and classes**
>
> (a) The militia of the United States consists of all able-bodied males at least 17 years of age and except as provided in section 313 of Title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and female citizens of the United States who are members of the National Guard.

18 U.S.C. § 922(o)(1) provides:

> **Unlawful acts**
>
> (1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

## STATEMENT OF THE CASE

Petitioner was indicted on March 17, 1998 for conspiracy (one object of which was to possess machineguns), possession of machineguns, and related counts.

Petitioner was convicted by a jury on November 18, 1998 of counts 1, 3, 4, 5, 6, 7, 8, and 12 and sentenced on May 26, 1999.

Petitioner filed his notice of appeal on May 27, 1999.

Petitioner filed his appellant's brief on August 5, 1999.

The government filed its appellee's brief on December 6, 1999.

Petitioner filed his reply brief on January 5, 2000.

The Order affirming the district court was entered June 28, 2000, see Pet. App 3a-12a. Petitioner's petition for rehearing and petition for rehearing en banc was denied on August 15, 2000, see Pet. App. 1a-2a.

## REASONS FOR GRANTING THE WRIT

This Court has not clarified the meaning of the Second Amendment, whether it is an individual or collective right, at any time in the twentieth century. The lack of guidance from this Court on that subject has left the lower courts in a state of confusion.

Neither has this Court clarified what a machinegun is or what evidence is required to prove that a particular weapon is, in fact, a machinegun.

## I. THE SECOND AMENDMENT OF THE UNITED STATES CONSTITUTION IS AN INDIVIDUAL RIGHT.

The Supreme Court's guidance [on the Second Amendment] has been notoriously scant. *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999).

The Supreme Court has shamelessly refused to discuss the issue. Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 654 (1990).

The confusion in the lower courts is easily seen:

The Second Amendment embodies the right to defend oneself and one's home against physical attack. *United States v. Gomez*, 81 F.3d 846, 850 n. 7 (9th Cir. 1996).

The Second Amendment right held by the states, does not protect the possession of a weapon by a private citizen. *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996).

The Honorable Cynthia Holcomb Hall sat on *both* of these cases, which appear to hold that one has a right to defend himself with a weapon he has no right to own.

"I am extremely suspicious of . . . most lawyers and judges." Ted Nugent, *God, Guns, & Rock N' Roll* (Regency Publishing 2000), page 92.

> The lower courts generally have either adopted an interpretation that is implausible on its face, inconsistent with Supreme Court precedent, and unsupported by historical evidence about the intention of the Framers, or adhered to ancient precedents that treated the Bill of Right as being inapplicable to the States. The Supreme Court, moreover, inscrutably denies all petitions for certiorari.
>
> Nelson Lund, *The Second Amendment, Political Liberty, And the Right to Self-Preservation*, 39 Ala.L.Rev. 103 (1987-1988).

See also *United States v. Sharp*, 12 F.3d 605, 608 (6th Cir. 1993) (American citizen has civil right to keep and bear arms), cf. *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (no individual right to posses a firearm).

Nor does the confusion end here.

The first Militia Act was enacted by Congress in 1792, I Stat. 271.

This statute is, in slightly modified form (one is no longer required to keep a rifle, 60 rounds of ammunition, and a tomahawk), still the law:

> **10 U.S.C. § 311 Militia: composition and classes**
>
> (a) The militia of the United States consists of all able-bodied males of at least 17 years of age and except as provided in section 313 of Title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and female citizens of the United States who are members of the National Guard.

Section 313 of Title 32 merely refers to those individuals who are already members of the National Guard. The nineteenth century Supreme Court flatly stated that "The militia is all citizens capable of bearing arms." *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

For an example of a 10 U.S.C. § 311(a) challenge raised and dismissed with no explanation, see *United States v. Rybar*, 103 F.3d 273, 286 (3rd Cir. 1996).

The Supreme Court does seem to have issued an "open invitation" to someone to submit a brief that will, once and for all, settle the national debate as to whether the Second Amendment confers an individual right to keep and bear arms or whether it does not:

> The Second Amendment similarly appears to contain an express limitation on the government's authority. That Amendment provides: "[a] well regulated Militia,

> being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. If, however, the Second Amendment is read to confer a *personal* right to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections. As the parties did not raise this argument, however, we need not consider it here. Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms "has justly been considered, as the palladium of the liberties of a republic." 3 J. Story, Commentaries Section(s) 1890, p. 746 (1833).
>
> *Printz v. United States*, 117 S.Ct. 2365, 2385 (1997) (footnotes omitted) (Justice Thomas, concurring) (striking down the challenged provisions of the Brady Act as inconsistent with the Tenth Amendment).

This is that opportunity.

Prior Supreme Court precedent provided more guidance than is currently available.

> [I]f they were entitled to the privileges and immunities of citizens . . . [the Constitution] would give to persons of the negro race the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak to hold public meetings upon political affairs, and to keep and carry arms wherever they went.
>
> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1856).

> In *Presser v. Illinois*, 116 U.S. 252, it was held that the Second Amendment to the Constitution, in regard to the right of the people to bear arms, is a limitation only on the power of Congress and the National Government, and not of the States. It was therein said, however, that, as all citizens capable of bearing arms constitute the reserved military force of the National Government, the States could not prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security and disable the people from performing their duty to the General Government.
>
> *Maxwell v. Dow*, 176 U.S. 581, 597, 20 S.Ct. 448, 44 L.Ed. 597 (1900).

Even more recent Supreme Court opinions appear to hold that the right to "keep and bear arms" is an individual right:

> Contrary to the suggestion of amici curiae that the Framers used this phrase "simply to avoid awkward rhetorical redundancy," Brief for American Civil Liberties Union et al. as Amici Curiae 12, n. 4, "the people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." See also U.S. Const., Amdt. 1 ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble"); Art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States"). While this textual exegesis is by no means conclusive, it suggests that

> "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.
>
> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990).

Congress has repeatedly utilized the commerce clause of Article I Section 8, clause 3 of the Constitution to regulate firearms:

> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

I.e., Congress utilized the commerce clause to *infringe* the right of the people to keep and bear arms.

What an infringement is, is easily seen:

> Infringement. A breaking into; a trespass or encroachment upon; a violation of a law, regulation, contract, or right.
>
> *Black's Law Dictionary*, p. 702 (5th ed. 1979).

Much of the "collective right" (which is supposedly not infringed) or the "individual right" (which, if it is an individual right, is infringed by Congress on a bi-annual basis) confusion began in 1905.

This "collective right" theory was first enunciated by the Kansas Supreme Court in 1905. *Salina v. Blakesly*, 72 Kansas 230, 83 Pacific Reporter 61 (1905). The theory is patently wrong. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Michigan Law Review 204, 211, note 31 (1983). As Professor Kates, in *Handgun Prohibition* pointed out, the word "people" in

the First and Fourth Amendments ("individuals") did not change meaning in the Second.

Once it is established that the Second Amendment confers an individual right, two questions arise:

1. May Congress use the interstate commerce clause to infringe an individual right?

2. May an *earlier* Constitutional enactment override a later amendment to the Constitution?

The answers to both questions appear to be "no."

Recent Supreme Court jurisprudence does appear to shed some light on the subject.

> Held: Section 13981 cannot be sustained under the Commerce Clause or § 5 of the Fourteenth Amendment. Pp. 7-28.
>
> (a) The Commerce Clause does not provide Congress with authority to enact § 13981's federal civil remedy. A congressional enactment will be invalidated only upon a plain showing that Congress has exceeded its constitutional bounds. See *United States v. Lopez*, 514 U.S. 549, 568, 577-578.
>
> *United States v. Morrison*, 99-5, syllabus (U.S. May 15, 2000).

There is one other issue in this regard.

Is the authority of the federal government to regulate the possession of weapons prohibited by the Ninth Amendment? See e.g., 24 Rutgers L.J. 1, 3 (1992), Fordham L.J. 31, 50 (1976).

One would think that the suspicions of citizens, not limited to those as well-known as Ted Nugent, could be considerably allayed by the granting of this petition.

> Mr. McKEOWN. . . . What is free government? In its last analysis it is the intelligent and impartial administration of justice. It is public justice that holds the Union together. It is to the courts that we look for the protection of our lives, liberty, reputation, and rights of property. The people have a greater concern in the judicial branch of the Government than in any other. It is to the courts that the people look to protect them in their rights against the Nation or the world.
>
> Congressional Record, Volume 72, page 9,988 (June 3, 1930) (71st Congress, 2nd Session)

It is to *this* Court that petitioner is looking to protect his rights. So far, all the lower courts have failed.

## II. THIS COURT HAS PROVIDED NO GUIDANCE TO THE LOWER COURTS AS TO WHAT CONSTITUTES A MACHINEGUN.

Petitioner was convicted of "possession of machineguns" and, among other objects of the conspiracy charged, "conspiracy to possess machineguns.

Petitioner possessed three (3) weapons that *looked* like machineguns, two (2) Browning .30 caliber and one (1) Browning .50 caliber firearms.

None of the weapons possessed by petitioner had the right sideplate, which is the registerable part. I.e., petitioner was actually innocent of the *statutory* violations charged.

A few excerpts from petitioner's appeal brief illustrate petitioner's actual innocence:

> Report of Investigation signed by prosecution witness BATF agent Mark Semear, dated September 3, 1997, "All three machine guns were missing side plates." See Exhibit 6.

Letter from BATF dated April 26, 1994 furnished by Assistant United States Attorney Lloyd K. Meyer to Appellant as part of discovery, page 2: "A right sideplate for a Browning machinegun is held to be a machinegun as defined." See Exhibit 7.

I.e., what Appellant had in his possession by definition were not machineguns.

The prosecution team neglected to show the jury the weapons in operation Appellant was charged with possessing. Not even a videotape of the weapons in operation was presented because they *could not* do so.

Pro Se Appellant's Brief, Memorandum, p. 8.

At closing argument Assistant U.S. Attorney Lloyd K. Meyer told the jury that Appellant "probably had the right side plates buried on his property." See Exhibit 16. I.e., Appellant was convicted due to, in part, *speculation* delivered by *trial ambush.*

There was *no evidence* that Appellant "buried side plates" to what the prosecutor told the jury were machineguns.

*Id.* at p. 18.

The Honorable Richard Alan Enslen totally neglected to instruct the jury regarding what turns a Browning .50 or .30 caliber weapon into a machinegun (the right side plate). Worse, he failed to instruct the jury as to what the definition of "readily converted" to machineguns is.

*Id.* at p. 19.

Petitioner's appeal in the lower court was incorrectly decided concerning this issue for one very simple reason: none of the appellate court judges involved in handling petitioner's appeal bothered to *read* the exhibits (excerpts of record) which included the government documents that conclusively demonstrated that this petitioner was factually innocent of the statutory violation with which he was charged.

Petitioner's fiancée, Loris Tompkins, traveled to Cincinnati to see if petitioner's Excerpts of Record were actually in the file. They were: untouched by human hands. The pristine condition of the Excerpts of Record indicated that volume had not even been opened. Those exhibits would have shown that the weapons petitioner possessed are commonly sold to individual citizens through such publications as *The Shotgun News*.

## CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BRADFORD METCALF
POST OFFICE BOX 33
TERRE HAUTE, IN 47808
*Pro se petitioner*

Dated: November _____, 2000

# APPENDIX

**APPENDIX A**

No. 99-1667

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRADFORD METCALF,
Defendant-Appellant.

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**ORDER**

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Filed August 15, 2000

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BEFORE: NELSON, BOGGS, AND DAUGHTREY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Leonard Green, Clerk

**APPENDIX B**

No. 99-1667

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRADFORD METCALF,
Defendant-Appellant.

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**ORDER**

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Filed June 28, 2000

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**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**
Sixth Circuit Rule 206 limits citations to specific situations. Please see Rule 206 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be *prominently* displayed if this decision is reproduced.

Before: NELSON, BOGGS, and DAUGHTREY, Circuit Judges.

This is an appeal from a judgment of conviction in a criminal prosecution. This case has been referred to a panel of the court pursuant to Rule 34(j)(2)(c), Rules of the Sixth

Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed.R.App.P.34(a).

In 1999, Bradford Metcalf was named in a multiple count indictment in connection with the possession of a number of weapons and a conspiracy to assault federal employees. Metcalf was subsequently tried to a jury and was found guilty of: conspiracy to possess machineguns, to threaten to assault and murder federal employees, in violation of 18 U.S.C. § 371; four counts of unlawfully possessing machineguns, in violation of 18 U.S.C. § 922(o)(1); two counts of unlawfully possessing a firearm silencer and a destructive device, in violation of 18 U.S.C. § 5861(d); and, using and carrying a semiautomatic assault weapon during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). The court sentenced Metcalf to an aggregate sentence of 480 months.

Defendant Metcalf sets forth ten issues for appellate review. These issues will be grouped for purposes of this discussion as allegations of pre-trial, trial or sentencing error. An examination of the record and law reflects that Metcalf supports almost none of his claims with concrete references to the record and, in any event, his bombastic appellate filings do not set forth any basis to interfere with the judgment on appeal.

*FACTS*

The evidence adduced at trial reflects the following: In 1996, federal law enforcement agents began an investigation of a self-styled militia group in Michigan after receiving information concerning the potentially dangerous activities of this group. This investigation first led the agents to the Kalamazoo residence of Brent Blasz, an individual who maintained a large private arsenal at his home. Amongst the items of destruction seized were materials for assembling and

detonating pipe bombs, a crime to which Blasz later pleaded guilty.

Blasz subsequently assisted in the investigation of other militia members, among them, leader Ken Carter and Randy Metcalf. Defendant Metcalf, as a member of the militia, shared in some of the group's objectives, namely, the possession of machineguns, the planning of attacks upon federal facilities and highways and threats to assault and murder federal employees. In addition, Metcalf permitted the militia free use of his forty acre tract of land for paramilitary training and armed conflict with federal agents. Blasz identified several of the militia's targets, including the federal building in Battle Creek, an Internal Revenue Service facility in Portage, a Kalamazoo highway interchange, a United States Senator, and federal judges and prosecutors.

Other avenues of investigation supported the case against Metcalf. A federal agent, Robert Stumpenhaus, infiltrated the militia in 1997 and had several discussions with Carter. Carter, as the leader of the militia, gave Stumpenhaus orders to destroy various public utilities on command and instructed Stumpenhaus in the craft of bomb-making. Carter also described in detail the defensive gun emplacements on Metcalf's property. Another militia member, Randy Graham, supplied Stumpenhaus with military explosives, a map of Calhoun County, Michigan with facilities marked for destruction and, finally, identified a member of the National Guard that the group marked to be murdered.

Federal law enforcement agents obtained a warrant to search Metcalf's property based on the information summarized above and found an impressive cache of weapons and related information. The inventory included: a .50 caliber machinegun, two .30 caliber machineguns with tens of thousands of rounds of belted ammunition, a .50 caliber sniper rifle with a high-powered spotting scope, "scores" of loaded semi-automatic assault weapons, tens of

thousands of rounds of ammunition, silencers, explosives, hulls for grenades, reference manuals and instructional videotapes for the making of car bombs and biological agents for placement in government air conditioning systems. Expert testimony at trial established the nature of these firearms and devices as inter alia silencers, destructive devices, machineguns and materials readily assembled as hand grenades or bombs.

On April 9,1999, and later on July 9,1999, Metcalf, Carter and Graham were charged with various counts related to the possession of machineguns and destructive devices, plots to kill federal officials and the possession of a semiautomatic assault weapon during and in relation to a crime of violence. A jury trial was thereafter conducted from November 2 through November 18, 1999, during which Metcalf insisted on representing himself while standby counsel was in attendance. The jury ultimately found Metcalf guilty of all but one count and the matter proceeded to sentencing. On May 26,1999, the court sentenced Metcalf to the 480 month sentence of record and this appeal followed.

On appeal, Metcalf has raised ten issues in his pro se filings. These claims, in the order set forth in Metcalf's appellate brief, are as follows:

1. Was the trial judge incompetent by reason of bias or biased by reason of incompetence, denying appellant due process?
2. Was the defendant actually innocent of all the statutory violations charged?
3. Were the statutes of which defendant was convicted beyond the authority of Congress to enact and hence unconstitutional?
4. Did the indictment violate the "notice" requirement of the Sixth Amendment, U.S. Constitution?
5. Were the indictment and trial based on perjured testimony?

6. Did the prosecutor conduct trial by ambush?
7. Was appellant's sentence illegal and imposed for unconstitutional reasons?
8. Were the jury instructions inadequate?
9. Was the conspiracy charge brought ht in violation of the First Amendment?
10. Were the grand jury proceedings that led to the indictment conducted in violation of the Fifth Amendment, U.S. Constitution?

*PRE-TRIAL CLAIMS*

Metcalf's tenth claim is that the grand jury proceedings leading to his indictment were tainted "in violation of the Fifth Amendment." Metcalf's support for this claim is the first of many "canned" memoranda and motions that are not specific to the facts of his case. This is a general indictment of the grand jury system in the United States and is not accompanied by any specific showing how Metcalf was indicted in an unfair or illegal manner. Counsel for the government notes this and, in addition, provides the court with a host of hornbook law standing for the proposition that, in the absence of any specific prejudice not cured by a subsequent jury verdict, any vague appellate claim of grand jury misconduct must fail. In a similar vein, Metcalf's, fifth claim is that his indictment was procured by "perjured testimony," a reference to alleged perjury committed during trial by Bureau of Alcohol, Tobacco and Firearms Special Agents Semear and Stumpenhaus. These cited instances go directly to the credibility of these two agents as they were giving their eyewitness testimony. At no time during trial did Metcalf request a dismissal of his indictment based on this alleged perjury. Absent such a request, this claim may only be reviewed for plain error. Fed.R.Crim.P.52(b). To obtain relief under a plain-error analysis, a defendant must show that: (1) an error occurred in the district court; (2) the

error was plain (obvious or clear); (3) the error a affected defendant's substantial rights; and (4) this adverse impact seriously affected the fairness, integrity or public reputation of the judicial proceedings. *See United States v. Koeberlein*, 161 F.3d 946, 949 (6th Cir.1998), cert. denied, 526 U.S. 1030 (1999). This claim, as with most of Metcalf's appellate arguments, rests solely on Metcalf's bald assertions of error and is of no moment.

Metcalf's third, fourth and ninth claims go to the sufficiency of the charging documents and the alleged lack of constitutional support for the crimes charged therein. Metcalf steadfastly maintains in his third claim that the Second Amendment protects his right to keep an arsenal of destructive weapons and other firepower that is otherwise expressly prohibited by statute. This is simply not the law.

> In [*United States v. Miller*, 307 U.S. 174 (1939)] the Supreme Court did not reach the question of the extent to which a weapon which is "part of the ordinary military equipment" or whose "use could contribute to the common defense" may be regulated. In holding that the absence of evidence placing the weapon involved in the charges against Miller in one of these categories precluded the trial court from quashing the indictment on Second Amendment grounds, the Court did not hold the converse—that the Second Amendment is an absolute prohibition against all regulation of the manufacture, transfer and possession of any instrument capable of being used in military action.
>
> *United States v. Warin*, 530 F.2d 103,106 (6th Cir. 1976).

Metcalf's fourth appellate claim is that the charging documents are unconstitutionally vague. This is tied to his ninth appellate issue, that the indictment is defective for charging Metcalf with a conspiracy based on "mere conversation." The focus of the latter claim is that the indictments did not set forth elements of the crimes charged or specify the exact parties and statements made in furtherance of the conspiracy. A comparison of the charging documents with the statutory references immediately puts to rest the claim that they did not identify with specificity the elements of the crimes charged. In addition, a valid indictment may charge a defendant with conspiring with unknown or unnamed individuals. *See United States v. Piccolo*, 723 F.2d 1234,1238 (6th Cir.1983). "[I]t is the grand jury's statement of the 'existence of the conspiracy agreement rather than the identity of those who agree' which places the defendant on notice of the charge he must be prepared to meet." *Id.* (quoting *United States v. Davis*, 679 F.2d 845, 851(11th Cir.1982)). The "mere conversation" claim is patently absurd. Proof of an overt act is clearly required in a conspiracy prosecution, *see* 18 U.S.C. § 371, Metcalf was on notice of this requirement and proof of an overt act was certainly set forth at trial. These three related claims lack merit.

*TRIAL CLAIMS*

Metcalf's first, second, sixth and eighth claims are directed to the conduct of the trial. His first contention is a glib accusation that his trial judge, Judge Enslen, was either incompetent or biased. Metcalf bases this on his wholly subjective trial "diary" entries and Metcalf s apparent belief that every time Judge Enslen ruled against him, Judge Enslen was demonstrating bias. "[A] judge must recuse [himself] if a reasonable, objective person, knowing all of the circumstances, would have questioned the judge's

impartiality." *Hughes v. United States*, 899 F.2d 1495, 1501 (6th Cir.1990). In *United States v. Sammons*, 918 F.2d 592 (6th Cir.1990), a panel of this court noted that "[t]he critical test is whether the alleged bias 'stem[s] from an extrajudicial source and result[s] in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'" *Id.* at 599 (quoting *Wheeler v. Southland Corp.*, 875 F.2d 1246,1251-52 (6th Cir. 1989)). Metcalf's claim in this regard is completely speculative and lacks merit.

Metcalf's sixth appellate argument is that the prosecutor conducted "trial by ambush." This is in reference to a remark made by the prosecutor in his closing argument to the effect that Metcalf probably still had machinegun parts buried on his property. The government notes that Metcalf did not make a contemporaneous objection to this isolated remark, and so he can only obtain a reversal upon a showing of plain error. *See United States v. Carroll*, 26 F.3d 1380,1383 (6th Cir.1994). "In the absence of an objection, only flagrant conduct will warrant a 'plain error' reversal." *United States v. Brown*, 66 F.3d 124,127 (6th Cir.1995). The comment in question, coming on the heels of the undeniable proof of Metcalf s private arsenal, does not require reversal.

Metcalf's eighth appellate issue is that the jury instructions were erroneous. This claim is solely based on Judge Enslen's purported ignorance of the mechanics of a machinegun and his unwillingness to set out this information for the jury. The government notes that Metcalf did not register a timely objection to this purportedly erroneous charge. Pursuant to Fed.R.Crim.P.30, "[n]o party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict . . . ." Defendant has forfeited the issue on appeal. *See United States v. Hatchett*, 918 F.2d 631, 643 (6th Cir.1990) (where a party fails to object to instruction at

trial, reversal is required only in exceptional circumstances to avoid a miscarriage of justice).

The final-issue presented by Metcalf going to the conduct of the trial is that he was "actually innocent" of the crimes charged. The government properly construes this as an assertion that Metcalf's conviction is not supported by the necessary quantum of evidence. "Evidence is sufficient to support a criminal conviction if, after viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *United States v. Beddow*, 957 F.2d 1350,1334 (6th Cir.1992). The reviewing court must resolve all reasonable factual inferences in favor of the verdict. *See United States v. Palomino*, 100 F.3d 446, 451 (6th Cir.1996). The summary of the evidence presented at trial, as set forth above, is ample support for a jury verdict that Metcalf deliberately associated himself with illegal weapons and instrumentalities of mass destruction and persons seemingly bent on using these tools for their infamous ends. This claim lacks merit.

*SENTENCE*

Metcalf's seventh appellate issue is a claim that his sentence was "illegal and imposed for unconstitutional reasons." Metcalf contends that his lengthy sentence was solely to punish him for exercising his right to trial by jury and to send this message to the community. He does not contend, and it does not otherwise appear, that the length of the term of incarceration or the period of supervised release were outside the realm of punishments authorized by the applicable statutes and guidelines.

A defendant may only seek review of his sentence on the grounds that: 1) the sentence was imposed in violation of law; 2) the sentence was imposed as a result of an incorrect application of the guidelines; 3) the sentence represented an

upward departure from the applicable guidelines range; or 4) the sentence is a plainly unreasonable sentence imposed for an offense for which there is no sentencing guideline. *See* 18 U.S.C. § 3742(a); *United States v. Lively*, 20 F.3d 193, 196-97 (6th Cir.1994); *United States v. Lavoie*, 19 F.3d 1102, 1103 (6th Cir.1994). This claim, and the entire appeal, is utterly meritless.

Accordingly, the district court's judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Leonard Green, Clerk